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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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DANIELLE GOLDEN,

Plaintiff,

v.

CAROLYN W. COLVIN,

Defendant.

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Case No. [16-cv-05362-MEJ](#)

**ORDER RE: CROSS-MOTIONS FOR
SUMMARY JUDGMENT**

Re: Dkt. Nos. 13, 18

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INTRODUCTION

Plaintiff Danielle Golden (“Plaintiff”) brings this action pursuant to 42 U.S.C. § 405(g), seeking judicial review of a final decision of Defendant Carolyn W. Colvin (“Defendant”), the Acting Commissioner of Social Security, denying Plaintiff’s claim for disability benefits. Pending before the Court are the parties’ cross-motions for summary judgment. Pl.’s Mot., Dkt. No. 13; Def.’s Mot., Dkt. No. 18. Pursuant to Civil Local Rule 16-5, the motions have been submitted on the papers without oral argument. Having carefully reviewed the parties’ positions, the Administrative Record (“AR”), and the relevant legal authority, the Court hereby **GRANTS** Plaintiff’s Motion and **DENIES** Defendant’s Cross-Motion for the reasons set forth below.

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BACKGROUND

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Plaintiff was born in 1981. She has an extensive history of alcohol and drug abuse, was homeless for five years, and has a documented history of psychiatric illness, including at least seventeen emergency psychiatric hospitalizations between 2010 and 2012. In July 2012, she began receiving inpatient psychiatric treatment. She alleges disability as the result of mental illness.

SOCIAL SECURITY ADMINISTRATION PROCEEDINGS

Plaintiff filed a claim for Supplemental Security Income under Title XVI, alleging disability beginning on December 31, 2005.¹ On August 22, 2013, the Social Security Administration (“SSA”) denied Plaintiff’s claim, finding that Plaintiff did not qualify for disability benefits. Plaintiff subsequently filed a request for reconsideration, which was denied on December 6, 2013. On December 18, 2013, Plaintiff requested a hearing before an Administrative Law Judge (“ALJ”). Plaintiff did not appear at the February 23, 2015 hearing before ALJ Lisewski, but her non-attorney representative did. AR 33. ALJ Lisewski issued a notice to show cause for failure to appear. AR 175. Plaintiff’s representative responded to the notice on March 4, 2015, and requested a supplemental hearing on Plaintiff’s behalf. AR 177. The representative explained she had been unable to reach Plaintiff, who was homeless and did not have a working phone. *Id.* ALJ Lisewski found Plaintiff had constructively waived her right to appear at the hearing and issued an unfavorable decision on March 31, 2015. AR 13. The Appeals Council denied Plaintiff’s request for review on July 26, 2016. AR 1-4. This appeal follows.

A. Medical Evidence of Record

Plaintiff concedes that the relevant period for establishing disability for purposes of her eligibility under Title XVI is of April 8, 2013 through March 31, 2015, the date of the ALJ's decision . Reply at 3 (citing AR 13).

1. Treatment Records

The AR demonstrates Plaintiff experienced significant disabling symptoms of mental illness for many years, leading to frequent psychiatric hospitalizations. *See, e.g.*, AR 327-330 (12/4/2010), 331-333 (10/22/2010), 334-336 (7/25/2010), 337-342 (1/8/2011), 623 (Plaintiff reports she was hospitalized more than twenty times), 643 (4/9/2012), 654-657 (7/16/2012). She was diagnosed with a psychotic disorder not otherwise specified, having bipolar disorder, and suffering from polysubstance abuse disorder. *Id.* (all); *see also* AR 572, 721. Plaintiff admitted

¹ Plaintiff also filed a Title II claim for disability insurance benefits, but now waives that claim. See Reply at 3, Dkt. No. 19.

1 using cocaine, methamphetamine, marijuana, and alcohol; she was not compliant with her
2 medications, including her antipsychotic medication. *See id.* (all); *see also* AR 571-74, 623, 635-
3 36.

4 In July 2012, Plaintiff was referred to Bonita House, a supported independent living
5 program. *See* AR 579-615 (7/2012-4/2013), 624, 760-794 (6/2013-2/2014). In her first year
6 working with Bonita House staff, Plaintiff met weekly with a case manager and monthly with a
7 psychiatrist, Dr. Floyd Brown, M.D.; she was medication adherent unless her boyfriend failed to
8 give them to her; she did not have any hospitalizations or incarcerations; and she reduced her
9 alcohol consumption because she wanted to be a good parent. AR 762. Although she reduced her
10 alcohol intake, she continued to drink daily: in June 2013, Plaintiff reported she was drinking 2
11 beers per day plus an estimated 4 to 5 shots of vodka. AR 769. Her mood had significantly
12 stabilized, with no evidence of depressed, elevated, or irritable mood. *Id.* In August 2013,
13 Plaintiff reported her children were now living with her; she showed no evidence of elevated,
14 irritable, or depressed mood and reported good sleep; she had reduced her alcohol consumption to
15 2 beers per day. AR 774.

16 In September 2013, Dr. Brown acknowledged that Plaintiff's drinking exacerbated her
17 symptoms. AR 778. Dr. Brown also stated that it was also true that Plaintiff's alcohol use was
18 triggered by the increased severity of bipolar disorder due to a combination of self-medication,
19 reduced judgment, and impulse control due to manic state. *Id.* He noted that Plaintiff's alcohol
20 use had reduced with the stabilization of her symptoms. *Id.* In September 2013, Plaintiff
21 indicated she wanted to stop drinking; Dr. Brown reported that Plaintiff was motivated more by
22 the denial of her SSI benefits than a true desire to stop drinking. AR 780. Dr. Brown noted
23 Plaintiff had appropriate affect with no evidence of elevated, irritable, or depressed mood; she
24 reported good medication adherence. *Id.* In October 2013, she reported good medical adherence,
25 reduced alcohol intake, and showed no evidence of elevated, irritable, or depressed mood. AR
26 784. Her "significant reduction" in alcohol use was confirmed by her case manager in November
27 and December 2013. AR 786, 790. Plaintiff continued to report good medical adherence and

1 presented no signs of depressed mood. *Id.* (both). In February 2014, Plaintiff presented with
2 pleasant affect and reported her mood was stable; she was taking an online computer course with
3 the goal of becoming a web designer; her thinking was well organized; she reported good
4 medication adherence and reduced drinking to one alcoholic beverage per day. AR 792.

5 In September 2013, Plaintiff's treating psychiatrist Dr. Brown completed a mental
6 impairment questionnaire for Plaintiff. He diagnosed her as having Bipolar I Disorder; prescribed
7 Abilify, Depakote, and Trazadone; and evaluated her as having 40 on the Global Assessment of
8 Functioning (GAF) scale.² AR 755. His clinical findings included impulsivity, impaired
9 judgment when in hypomanic state, and increased alcohol use resulting from unstable moods. AR
10 755. He opined that Plaintiff's impairments were not caused by substance abuse, but rather, that
11 substance use was exacerbated by bipolar symptoms. *Id.*; *see also* AR 759 ("[A]lcohol
12 dependence which results from unstable mood disorder with psychotic features. Alcohol use
13 reduced with improved management of mood disorder."). He anticipated her impairments or
14 treatment would cause Plaintiff to be absent from work more than four days per month. AR 756.
15 He opined Plaintiff had numerous marked and moderate impairments of mental abilities and
16 aptitudes needed to do unskilled, semi-skilled, and skilled work; and moderate impairments in her
17 ability to interact with the public, maintain socially appropriate behavior, adhere to basic standards
18 of neatness and cleanliness, and use public transportation. AR 757-58. He opined Plaintiff had
19 moderate restrictions in her activities of daily living; marked restrictions in maintaining social
20 functioning; marked deficiencies of concentration, persistence, or pace; and would have four or

22 ² The GAF does not correlate to the severity assessments utilized in Social Security disability
23 determinations. While GAF scores therefore are not dispositive as to a claimant's general
24 functional abilities, they are nonetheless relevant. *See Graham v. Astrue*, 385 Fed. App'x 704,
25 706 (9th Cir. 2010); *see also Wilkerson v. Berryhill*, 2017 WL 4340365, at *14 (N.D. Cal. Sept.
26 29, 2017) (failure of ALJ to consider GAF scores from acceptable medical source and other source
27 or provide explanation for rejecting them was error). A GAF of 31-40 indicates "[s]ome
irrelevant) OR major impairment in several areas, such as work or school, family relations,
judgment, thinking, or mood (e.g., depressed man avoids friends, neglects family, and is unable to
work. . . .)" Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders, at 34
(4th ed. 2000). A GAF of 41-50 indicates serious symptoms such as suicidal ideation, severe
obsessional rituals, or serious impairment in social, work, or school functioning. *Id.*

1 more repeated episodes of decompensation within a 12 month period, each lasting at least two
2 weeks in duration. AR 758.

3 The following month, Dr. Brown also submitted a letter in support of Plaintiff's
4 application for disability benefits. AR 671. He opined Plaintiff was totally disabled by her mental
5 disorders, which include bipolar disorder and alcohol dependence, and that she had made strides
6 toward improvement, but was likely to remain disabled for employment for the next 12-18
7 months. He stated Plaintiff's psychiatric condition interferes significantly with her ability to
8 sustain attention, complete tasks, interact appropriately with others, and adapt to novel situations;
9 it also leaves her prone to impulsive behaviors and impaired judgment. *Id.*

10 In February 2015, Dr. Brown submitted another mental impairment questionnaire
11 describing Plaintiff's level of functioning. AR 700-03. Plaintiff had been sober for one month.
12 AR 700. She nonetheless continued to exhibit manic symptoms, including poor judgment, lack of
13 impulse control, pressured speech, and difficulty in concentrating. *Id.* Dr. Brown continued to
14 find numerous marked and extreme limitations in Plaintiff's work-related mental activities, and
15 that Plaintiff would be absent from work more than four days per month as a result of her
16 impairments or treatment. AR 701-03. He observed Plaintiff's psychiatric condition interfered
17 with her ability to follow up on appointments. AR 700. He assigned her a GAF of 40. *Id.*

18 2. Psychological Examiner

19 On May 7, 2013, Lesleigh Franklin, Ph.D., examined Plaintiff and submitted a
20 psychological report based on a three-hour evaluation and numerous tests. AR 622-34. At the
21 time of testing, Plaintiff reported she had abstained from cocaine and methamphetamine use for
22 over a year, but she was still consuming alcohol daily. AR 623 (one to three drinks a day, five to
23 seven times per week).

24 Dr. Franklin performed a variety of clinical tests to measure Plaintiff's abilities. She found
25 Plaintiff's memory was "solid" and found Plaintiff demonstrated significant trouble with attention
26 and concentration tasks and was impaired; had moderate difficulties in other areas of executive
27 functioning; had adequate language skills; had variable performance on measures of visual spatial
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1 abilities and was impaired; and had variable performance on her overall cognitive scores. AR
2 627-28. Plaintiff was not found to be exaggerating her symptoms. AR 628. Dr. Franklin opined
3 Plaintiff's symptoms were consistent with the kinds of symptoms sometime seen in bipolar
4 disorders, and should not be attributed solely to her substance abuse. AR 630. She diagnosed
5 Plaintiff with Bipolar I Disorder, Severe with Psychotic Features; and Alcohol Dependence; she
6 assessed Plaintiff's GAF at 45. AR 630. Dr. Franklin opined that Plaintiff's "drinking problem is
7 exacerbating her mental health problem, but it is not the cause of it. Her bipolar disorder would
8 definitely exist even if she was clean and sober." AR 631; *see also* AR 630 ("Her psychotic
9 symptoms appear to be consistent with the kinds of symptoms sometime seen in Bipolar
10 Disorders, and should not be attributed solely to her substance abuse."). While Plaintiff was not
11 psychotic at the time of the evaluation, Dr. Franklin wrote Plaintiff could become psychotic
12 quickly with a missed dose of medication or while under stress. AR 631. Plaintiff could be
13 triggered by work stress into a manic state, in which case it would be difficult to predict her work
14 behavior. AR 631. Overall, she assessed "extreme" or "marked" limitations in several areas of
15 functioning needed to perform unskilled work. AR 634.

16 Dr. Franklin also observed that Plaintiff was slow moving and mildly confused in the way
17 that can be seen with large doses of psychotropic medication. AR 626; *see also* AR 625
18 (observing that Plaintiff "appears to be on a lot of medications which are slowing her down"). She
19 reported Plaintiff hated her medications because they made her feel tired and lifeless, like she has
20 lost herself. AR 624. While the medications significantly reduced her psychosis, Plaintiff also
21 reported they made her feel depressed and suicidal. AR 624.

22 3. SSA Consultants

23 SSA consultant Nicole Lazorwitz, Psy. D., reviewed Plaintiff's records through May 2013
24 and opined that Plaintiff's symptoms improved significantly while in treatment, that her mood
25 improved when she was compliant with medication and treatment, that medication appeared to
26 make her slow, and that her substance use appeared to be material as her symptoms significantly
27 improves when she was compliant with treatment and medication. AR 46. Dr. Lazorwitz opined

1 that if Plaintiff continued to refrain from substances and follows treatment, it appears she could at
2 least perform simple tasks with limited contacts. AR 46; *see also* AR 48 (“Claimant has extensive
3 history of substance abuse and psychiatric symptoms. Noted history of significant improvement
4 during times of sobriety and treatment compliance. Drug and alcohol abuse appears material.
5 Without ongoing substance use, claimant’s symptoms still appear to cause more than minimal
6 impact on functioning, but do not entirely preclude significant gainful employment.”). Dr.
7 Lazorwitz acknowledged Dr. Franklin’s assessment. AR 40. In explaining how she weighed Dr.
8 Franklin’s opinion, Dr. Lazorwitz stated: “Dr. Franklin’s MSS appears to include [Claimant’s]
9 ongoing substance use, therefore taken into consideration within the context of other available
10 evidence.” *Id.*

11 At the reconsideration level, another SSA consultant reviewed Plaintiff’s records through
12 October 2013, including Dr. Brown’s first opinion. AR 72, 77. H. Thomas Unger, M.D., opined
13 that both Plaintiff’s alcohol and drug addiction were material, and that Plaintiff would not be
14 considered disabled without her substance abuse. AR 75-82. Dr. Unger explained he weighed Dr.
15 Brown’s opinion dated October 23, 2013: “Partially consistent with the objecting findings—Dx—
16 Polysubstance dependence.” AR 77.

17 Neither Drs. Lazowritz nor Unger reviewed Dr. Brown’s February 2015 opinion.

18 **B. The ALJ’s Findings**

19 The regulations promulgated by the Commissioner of Social Security provide for a five-
20 step sequential analysis to determine whether a Social Security claimant is disabled.³ 20 C.F.R. §
21 404.1520. The sequential inquiry is terminated when “a question is answered affirmatively or
22 negatively in such a way that a decision can be made that a claimant is or is not disabled.” *Pitzer*
23 v. *Sullivan*, 908 F.2d 502, 504 (9th Cir. 1990). During the first four steps of this sequential
24 inquiry, the claimant bears the burden of proof to demonstrate disability. *Valentine v. Comm’r*
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27 ³ Disability is “the inability to engage in any substantial gainful activity” because of a medical
28 impairment which can result in death or “which has lasted or can be expected to last for a
continuous period of not less than 12 months.” 42 U.S.C. § 423(d)(1)(A).

Soc. Sec. Admin., 574 F.3d 685, 689 (9th Cir. 2009). At step five, the burden shifts to the Commissioner “to show that the claimant can do other kinds of work.” *Id.* (quoting *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988)).

The ALJ must first determine whether the claimant is performing “substantial gainful activity,” which would mandate that the claimant be found not disabled regardless of medical condition, age, education, and work experience. 20 C.F.R. § 404.1520(a)(4)(i), (b). Here, the ALJ determined that Plaintiff had not performed substantial gainful activity since December 31, 2005. AR 19.

At step two, the ALJ must determine, based on medical findings, whether the claimant has a “severe” impairment or combination of impairments as defined by the Social Security Act. 20 C.F.R. § 404.1520(a)(4)(ii). If no severe impairment is found, the claimant is not disabled. 20 C.F.R. § 404.1520(c). Here, the ALJ determined that Plaintiff had the following severe impairments: bipolar disorder and polysubstance abuse. AR 19.

If the ALJ determines that the claimant has a severe impairment, the process proceeds to the third step, where the ALJ must determine whether the claimant has an impairment or combination of impairments that meet or equals an impairment listed in 20 C.F.R. Part 404, Subpt. P, App. 1 (the “Listing of Impairments”). 20 C.F.R. § 404.1520(a)(4)(iii). If a claimant’s impairment either meets the listed criteria for the diagnosis or is medically equivalent to the criteria of the diagnosis, he is conclusively presumed to be disabled, without considering age, education and work experience. 20 C.F.R. § 404.1520(d). Here, the ALJ determined that Plaintiff had an impairment or combination of impairments that meets the listings. AR 19-20.

Specifically, the ALJ found Plaintiff’s impairments met the requirements of Listing 12.04 for affective disorders and 12.09 for drug and/or alcohol abuse. *Id.* However, the ALJ found that without the effects of Plaintiff’s drug and/or alcohol abuse, the limitations caused by Plaintiff’s remaining impairment did not meet or equal any listing. *Id.*

Before proceeding to step four, the ALJ must determine the claimant's Residual Function Capacity ("RFC"). 20 C.F.R. § 404.1520(e). RFC refers to what an individual can do in a work

1 setting, despite mental or physical limitations caused by impairments or related symptoms. 20
2 C.F.R. § 404.1545(a)(1). In assessing an individual's RFC, the ALJ must consider all of the
3 claimant's medically determinable impairments, including the medically determinable
4 impairments that are nonsevere. 20 C.F.R. § 404.1545(e). Here, the ALJ determined that Plaintiff
5 has the RFC to perform the full range of exertional work, but was limited to simple, routine work
6 with no more than occasional social interaction with coworkers, supervisors, and the public, and
7 with some additional non-exertional limitations. AR 21-24.

8 The fourth step of the evaluation process requires that the ALJ determine whether the
9 claimant's RFC is sufficient to perform past relevant work. 20 C.F.R. §§ 404.1520(a)(4)(iv);
10 404.1520(f). Past relevant work is work performed within the past 15 years that was substantial
11 gainful activity, and that lasted long enough for the claimant to learn to do it. 20 C.F.R. §
12 404.1560(b)(1). If the claimant has the RFC to do her past relevant work, the claimant is not
13 disabled. 20 C.F.R. § 404.1520(a)(4) (iv). Here, the ALJ determined that if Plaintiff stopped her
14 substance abuse, she would be unable to return to her past relevant work due to her non-exertional
15 limitations. AR 21.

16 In the fifth step of the analysis, the burden shifts to the Commissioner to prove that there
17 are other jobs existing in significant numbers in the national economy which the claimant can
18 perform consistent with the claimant's RFC, age, education, and work experience. 20 C.F.R. §§
19 404.1520(g); 404.1560(c). The Commissioner can meet this burden by relying on the testimony of
20 a vocational expert or by reference to the Medical-Vocational Guidelines at 20 C.F.R. pt. 404,
21 Subpt. P, App. 2. *Lounsherry v. Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006). Here, based on
22 the testimony of the vocational expert, Plaintiff's age, education, work experience, and RFC, the
23 ALJ determined Plaintiff could perform work as a hotel housekeeper; officer helper; and hand
24 packager, all of which were available in significant numbers in the national economy. AR 25, 36-
25 37.

26 **LEGAL STANDARD**

27 This Court has jurisdiction to review final decisions of the Commissioner pursuant to 42
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1 U.S.C. § 405(g). The ALJ’s decision must be affirmed if the findings are “supported by
2 substantial evidence and if the [ALJ] applied the correct legal standards.” *Holohan v. Massanari*,
3 246 F.3d 1195, 1201 (9th Cir. 2001) (citation omitted). “Substantial evidence means more than a
4 scintilla but less than a preponderance” of evidence that “a reasonable person might accept as
5 adequate to support a conclusion.” *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002)
6 (quoting *Flaten v. Sec’y of Health & Human Servs.*, 44 F.3d 1453, 1457 (9th Cir. 1995)). The
7 court must consider the administrative record as a whole, weighing the evidence that both supports
8 and detracts from the ALJ’s conclusion. *McAllister v. Sullivan*, 888 F.2d 599, 602 (9th Cir. 1989).
9 However, “where the evidence is susceptible to more than one rational interpretation,” the court
10 must uphold the ALJ’s decision. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989).
11 Determinations of credibility, resolution of conflicts in medical testimony, and all other
12 ambiguities are to be resolved by the ALJ. *Id.*

13 Additionally, the harmless error rule applies where substantial evidence otherwise supports
14 the ALJ’s decision. *Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th Cir. 1990). A court may not
15 reverse an ALJ’s decision on account of an error that is harmless. *Molina v. Astrue*, 674 F.3d
16 1104, 1111 (9th Cir. 2012) (citing *Stout v. Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055-56
17 (9th Cir. 2006)). “[T]he burden of showing that an error is harmful normally falls upon the party
18 attacking the agency’s determination.” *Id.* (quoting *Shinseki v. Sanders*, 556 U.S. 396, 409
19 (2009)).

20 DISCUSSION

21 A. Whether the ALJ’s Decision is Based on Substantial Evidence

22 Because the ALJ’s evaluation of the materiality of Plaintiff’s substance use is inexorably
23 intertwined with the ALJ’s weighing of opinion evidence, the Court analyzes both issues together.

24 1. Opinions by Treating and Examining Physicians

25 “Cases in [the Ninth Circuit] distinguish among the opinions of three types of physicians:
26 (1) those who treat the claimant (treating physicians); (2) those who examine but do not treat the
27 claimant (examining physicians); and (3) those who neither examine nor treat the claimant

1 (nonexamining physicians).” *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Generally, an
2 opinion of a treating physician should be favored over that of a non-treating physician. *Id.* at 830–
3 31. However, a treating physician’s opinion “is not binding on an ALJ with respect to the
4 existence of an impairment or the ultimate determination of disability.” *Tonapetyan v. Halter*, 242
5 F.3d 1144, 1148 (9th Cir. 2001). If a treating physician’s opinion is uncontradicted, an ALJ must
6 give “clear and convincing” reasons that are supported by substantial evidence to reject the
7 opinion. *Lester*, 81 F.3d at 830-31. If the treating physician’s opinion is contradicted, an ALJ
8 needs to only give “specific and legitimate reasons [that are] supported by substantial evidence in
9 the record” to reject the opinion. *Id.* Further, the opinions of a specialist about medical issues
10 related to his or her area of specialization are given more weight than the opinions of a
11 nonspecialist. 20 C.F.R. § 404.1527(c)(5); 20 C.F.R. § 416.927(c)(5). “The opinion of a
12 nonexamining physician cannot by itself constitute substantial evidence that justifies the rejection
13 of the opinion of either an examining physician or a treating physician.” *Lester*, 81 F.3d at 831
14 (describing circumstances in which opinion of nonexamining physician constituted substantial
15 evidence). “The ALJ is responsible for determining credibility and resolving conflicts” or
16 ambiguities in the medical evidence. *Magallanes*, 881 F.2d at 750.

17 Here, the ALJ placed “considerable weight” on the opinions of the two state consultants
18 because these were based on a thorough review of the evidence, and they were not inconsistent
19 with other substantial evidence of record. AR 23. Although the consultants had not been able to
20 review Plaintiff’s more recent records, including Dr. Brown’s 2015 opinion, their “opinions
21 continue to represent a reasonable consideration of [Plaintiff’s] functioning given her treatment
22 history and polysubstance use.” *Id.*

23 The ALJ gave Dr. Brown’s opinions no weight because: (1) Dr. Brown noted plaintiff’s
24 symptoms improved as her alcohol use was reduced, and (2) Dr. Brown formulated his opinion
25 after Plaintiff had abstained for only one month, and “individuals often require more than one
26 month of sobriety before discovering whether their symptoms truly arise from their mental
27 impairments rather than their substance use.” *Id.* The ALJ also placed little weight on Dr.
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1 Franklin's opinion because: (1) Dr. Franklin saw Plaintiff only once; (2) Dr. Franklin did not have
2 an opportunity to review the entire record; and (3) her opinions are not consistent with the overall
3 record as it fails to adequately consider Plaintiff's drug and alcohol use. *Id.*

4 3. Materiality of Drug and Alcohol Use

5 If a claimant is found to be disabled and there is medical evidence of a substance use
6 disorder, the ALJ must determine whether the substance use disorder is a contributing factor
7 material to the determination of disability. AR 18. In making that determination, the ALJ must
8 evaluate the extent to which the claimant's mental and physical limitations would remain if the
9 claimant stopped the substance use. *Id.* If the remaining limitations would not be disabling, the
10 substance use disorder is a contributing factor material to the determination of disability, and the
11 claimant is not disabled. *See* 20 C.F.R. §§ 404.1535(b)(1), 416.935; *see generally Bustamante v.*
12 *Massanari*, 262 F.3d 949, 956 (9th Cir. 2001). The claimant bears the burden of showing her
13 substance use disorder is not a contributing factor material to disability. *See Parra v. Astrue*, 481
14 F.3d 742, 748 (9th Cir. 2007).

15 The ALJ found that Plaintiff's "depression" might continue to have more than a minimal
16 impact on her ability to perform basic work activities even if Plaintiff stopped her substance use.
17 AR 20. The ALJ's finding was based on the fact Plaintiff "continued to complain of depression
18 during periods where it appeared she was clean and sober, though the record is not dispositive."
19 *Id.* The ALJ then determined that if Plaintiff stopped her substance use, she would not have an
20 impairment or combination of impairments that meets or medically equals any impairments
21 because she would only have mild restrictions in activities of daily living; moderate restrictions in
22 social functioning; and moderate difficulties in concentration, persistence or pace. *Id.* The ALJ
23 further determined that the absence of drug and alcohol would significantly improve Plaintiff's
24 sleep disturbances, energy level, attention and concentration; "she would no longer suffer from
25 auditory hallucinations"; and she would experience no episodes of decompensation. *Id.* The ALJ
26 found there "is no history of any episodes of decompensation or of an inability to function outside
27 of a highly supportive living arrangement. There is no evidence that a residual disease process

1 that has resulted in marginal adjustment such that even a minimal increase in mental demands or
2 change in environment would be predicted to cause the claimant to decompensation.” AR 21.
3 The ALJ did not identify the evidence that supports these conclusions. *Id.*

4 In evaluating Plaintiff’s RFC, the ALJ found Plaintiff had failed to “present conclusive
5 evidence that, if she ceased using drugs and alcohol, her mental impairment would remain
6 disabling. The overall record shows that her drug use has been continuous since at least 2008 with
7 very little active mental health treatment.” AR 22. The ALJ summarized Plaintiff’s numerous
8 hospitalizations prior to mid-2012, and then the improvement in Plaintiff’s symptoms after she
9 began working with the Bonita House. AR 22. Reviewing Plaintiff’s most recent clinical notes
10 from February 2014, the ALJ observed that Plaintiff’s mood was stable and her thinking was well
11 organized without evidence of hypomanic, depression, delusions, loose or tangential associations,
12 or auditory hallucinations; she was taking her medications without complaint; and she was taking
13 an online computer course. AR 22 (citing Ex. 32/F at 33). She concluded that, “[b]ased on the
14 overall record, there is no evidence to support the notion that the disabling effects of the
15 claimant’s mental impairments would remain in the absence of all drug and alcohol use.” *Id.*

16 4. Analysis

17 By the time Dr. Brown offered his first opinion regarding Plaintiff’s functioning, he had
18 been treating Plaintiff monthly for eleven months; by the time he offered his second opinion, he
19 had been treating her monthly for two-and-a-half years. Dr. Brown completed progress notes for
20 Plaintiff’s visits in which he documented her progress and her problems. Based on his treatment
21 of Plaintiff, he opined that Plaintiff’s substance abuse was exacerbated by her bipolar symptoms,
22 and that alcohol use did not cause her bipolar disorder. AR 755; *see also* AR 759 (alcohol
23 dependence results from unstable mood disorder), 778. Similarly, after examining and testing
24 Plaintiff for three hours, Dr. Franklin opined that Plaintiff’s “bipolar disorder would definitively
25 exist even if she was clean and sober.” AR 631. Plaintiff reported she had stopped using
26 marijuana, cocaine, and methamphetamines in June 2012. AR 765. By the time Dr. Franklin
27 completed her evaluation in July 2013, Plaintiff had stopped using cocaine and methamphetamine

1 for approximately one year; by the time Dr. Brown completed his evaluation in September 2013,
2 Plaintiff had abstained from these drugs for more than one year. Plaintiff also had reduced her
3 alcohol consumption to two beers per day. AR 774, 780; *see also* AR 792 (by February 2014, she
4 had reduced her alcohol consumption to a single 24 ounce beverage with 12% alcohol content).
5 By the time he completed his evaluation in February 2015, Plaintiff had stopped drinking alcohol
6 for one month. AR 700. At that point, Dr. Brown opined Plaintiff continued to exhibit manic
7 symptoms and that as a result of her psychiatric condition, she had trouble following through with
8 appointments. AR 700.

9 Both Drs. Brown and Franklin opined that Plaintiff's bipolar disorder symptoms would
10 continue to impair her ability to work if she was clean and sober, and Dr. Brown found that
11 Plaintiff's symptoms in fact did continue when Plaintiff was clean and sober. The ALJ gave no
12 weight to either of these opinions, relying instead on the opinions of the SSA non-examining
13 consultants who found that Plaintiff's substance use was material. The contrary opinions by Drs.
14 Lazorwitz and Unger cannot by themselves "constitute substantial evidence that justifies the
15 rejection" of Drs. Brown and Franklin's opinions. *See Lester*, 81 F.3d at 831; *Buck v. Berryhill*,
16 869 F.3d 1040, 1049-50 (9th Cir. 2017) (applying *Lester* and finding it was error for ALJ to reject
17 opinion of examining physician based on opinion of non-examining expert, especially when
18 opinion of non-examining expert is contradicted by other source).⁴ The ALJ fails to identify any
19 other substantial evidence supporting her rejection of the opinions submitted by Drs. Brown and
20 Franklin.

21 First, the ALJ did not acknowledge the nature of Plaintiff's bipolar disorder.⁵ The ALJ
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23 ⁴ It is not clear these opinions in fact contradict the key opinions of Drs. Brown and Franklin that
24 Plaintiff's bipolar disorder exacerbated her drinking, and was not caused by her drinking. Neither
25 the two consultants nor the ALJ addressed these specific conclusions. The consultants also did not
26 differentiate between the impact of Plaintiff's drug use, which had ceased approximately one year
before Drs. Brown and Franklin offered their opinions, and her alcohol use, which had decreased
but did not cease. This distinction is not material, as the Court concludes the ALJ failed to offer
specific and legitimate reasons for rejecting the opinions of Drs. Brown and Franklin.

27 ⁵ Indeed, the ALJ found that if Plaintiff stopped the substance use, Plaintiff *might* continue to have
28 severe impairment caused by *depression*. AR 20 ("The claimant continues to complain of

1 based her conclusion that drug and alcohol use were material on the fact Plaintiff had improved
2 significantly by February 2014, when Dr. Brown noted that Plaintiff's mood was stable and her
3 thinking was well organized without evidence of hypomanic, depression, delusions, loose or
4 tangential associations, or auditory hallucinations; she was taking her medications without
5 complaint; and she was taking an online computer course. AR 22. But the ALJ did not address
6 Dr. Brown's concurrent assessment that Plaintiff continued to present a moderate level of risk due
7 to chronic conditions, "with high risk of psychiatric relapse and poor medication adherence." AR
8 793. Similarly, because the ALJ gave no weight to Dr. Franklin's opinion, the ALJ did not take
9 into account Dr. Franklin's observation that Plaintiff has continued to demonstrate mood
10 instability even as she improved with treatment, and that Plaintiff sometimes appeared manic, and
11 other times appeared sad, hopeless, and despondent. AR 631. The ALJ also did not acknowledge
12 Dr. Franklin's opinion that Plaintiff "could become psychotic quickly with a missed dose of
13 medication or while under stress." *Id.*; *see also id.* ("Due to the nature of her illness, [Plaintiff]
14 could be triggered by work stress into a manic state. If this were to occur, it is difficult to predict
15 [her] work behavior."). Thus, while the ALJ accurately identifies evidence of improvement in the
16 record, she fails to examine this evidence in the broader context of Plaintiff's diagnosed bipolar
17 disorder. "It is the nature of bipolar disorder that symptoms wax and wane over time. With
18 respect to such impairments, 'improvement . . . that is only temporary will not warrant a finding of
19 medical improvement.'" *Attmore v. Colvin*, 827 F.3d 872, 878 (9th Cir. 2016) (error to point to
20 isolated signs of improvement; ALJ could not support finding of improvement unless claimant
21 showed sustained improvement) (quoting 20 C.F.R. § 404.1594(c)(3)(iv)); *see also Michalski v.*
22 *Colvin*, 2016 WL 4585570, at *8 (N.D. Cal. Sept. 2, 2016) ("DSM-V notes that 'many individuals
23 with bipolar disorder return to fully functional levels between episodes.'"). The fact Plaintiff did
24 not act depressed and was not in an active manic state during certain appointments with Dr. Brown
25 does not constitute substantial evidence that her bipolar disorder is sufficiently improved to

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27 depression during period where it appeared she was clean and sober, though the record is not
28 dispositive."). Depression is but one of the symptoms of Plaintiff's bipolar disorder.

1 contradict the limitations identified by Drs. Brown and Foster.

2 Second, there is no evidence in the record to support the ALJ's apparent opinion that the
3 level of alcohol Plaintiff was consuming at the time of Dr. Brown's and Dr. Franklin's evaluations
4 was a material contributor to the mental impairments Drs. Brown and Franklin continued to
5 identify. Drs. Lazorwitz and Unger do not distinguish between Plaintiff's admitted use of cocaine
6 and methamphetamine, her heavier use of alcohol when she first began treatment through Bonita
7 House, and the two (or no) drinks per day Plaintiff was having at the time Drs. Brown and
8 Franklin offered their opinions about her functionality.

9 Third, the ALJ misstated the evidence when she interpreted Dr. Brown's notes that
10 "Plaintiff improved as her alcohol use reduced, indicat[ed] that her alcohol use has played a
11 significant part in her functioning." AR 23. In fact, as described above, Dr. Brown indicated
12 repeatedly that Plaintiff's alcohol use was reduced as her symptoms improved and that Plaintiff
13 drinks more as a result of her bipolar disorder. The ALJ also notes that Dr. Brown indicated
14 Plaintiff remains symptomatic after abstaining from alcohol for only a month, but argues this
15 opinion is not well-supported by the objective medical evidence nor consistent with the record
16 because "individuals often require more than one month of sobriety before discovering whether
17 their symptoms truly arise from their mental impairments rather than their substance use." AR 23
18 (referring to Dr. Brown's February 2015 mental impairment questionnaire (AR 700-703)). By this
19 time, Dr. Brown had been treating Plaintiff on a monthly basis for two-and-a-half years. The ALJ
20 offers no basis for her assumption that Dr. Brown, as a licensed psychiatrist working with Bonita
21 House's clientele and with Plaintiff in particular, might not be aware of the amount of sobriety
22 required before discovering whether a patient's symptoms truly arise from mental impairments
23 rather than substance abuse. Moreover, a Social Security claimant need not demonstrate a period
24 of abstinence from substance use in order to be considered disabled. "[A]n acceptable medical
25 source can provide a medical opinion regarding whether the claimant's impairments would be
26 severely limiting even if the claimant stopped abusing drugs or alcohol. We consider the opinion
27 of an acceptable medical source sufficient evidence regarding materiality as long as the acceptable

1 medical source provides support for their opinion.” Soc. Sec. R. 13-2p(6)(c)(4). There is no
2 dispute Dr. Brown is an acceptable medical source. He provided support for his first opinion by
3 explaining that Plaintiff’s disorder exacerbated her drinking and that her drinking did not cause her
4 bipolar disorder or manic states, even if it could exacerbate them. He also provided support for his
5 opinion that, even when sober, Plaintiff continued to exhibit manic symptoms, including poor
6 judgment, lack of impulse control, pressured speech, and difficulty concentration. He further
7 explained that Plaintiff had difficulty following through with appointments because of her
8 condition.

9 Fourth, the ALJ offers no basis for her assumption that Dr. Franklin’s examination “fails to
10 adequately consider” Plaintiff’s drug and alcohol use (AR 23). As indicated above, Dr. Franklin
11 opined Plaintiff’s psychotic symptoms appear to be consistent with the kinds of symptoms
12 sometime seen in bipolar disorder, and should not be attributed solely to her substance abuse; that
13 Plaintiff would continue to be disabled even when clean and sober; and that Plaintiff could be
14 “quickly” triggered into a manic state by one missed dose of medication or by a work stress (AR
15 630-31). Thus, the evidence demonstrates Dr. Franklin did explicitly consider Plaintiff’s
16 substance abuse in evaluating her ability to work.⁶

17 For these reasons, the Court finds the ALJ did not articulate specific and legitimate reasons
18 for rejecting the opinions of Drs. Brown and Franklin, and did not base her finding that Plaintiff’s
19 drug and alcohol abuse was material to her impairment on substantial evidence.

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22 ⁶ The ALJ’s remaining reasons for rejecting Dr. Franklin’s opinions are not legitimate. The ALJ
23 rejected Dr. Franklin’s conclusions because she only saw Plaintiff once. AR 23. While this might
24 be a specific and legitimate reason for rejecting Dr. Franklin’s opinion in favor of the opinion of a
25 physician who saw Plaintiff more than once, here the ALJ relied instead on the opinions of SSA
26 consultants who never saw Plaintiff. The ALJ also rejected Dr. Franklin’s opinion because Dr.
27 Franklin had not had the opportunity to review the entire record. *Id.* But the ALJ placed
considerable weight on the opinions of the non-examining SSA consultants despite the fact they
were not able to consider the full record. *Id.* Dr. Franklin’s July 2013 opinion reflects a thorough
summary of Plaintiff’s medical history and is consistent with Dr. Brown’s September 2013
opinion, and the ALJ does not identify what records she believes Dr. Franklin would have needed
to consider to render her opinion worthy of consideration.

1 **B. Plaintiff's Nonappearance at the Hearing**

2 Plaintiff argues the ALJ erred in denying her request for a hearing without determining
3 whether she had good cause for failing to appear at the original hearing. *See* Pl.'s Mot. at 8-10.

4 At the February 23, 2015 hearing, Plaintiff's representative appeared but Plaintiff did not.
5 When an appointed representative appears at the hearing, and continues to represent the claimant
6 at the hearing but is unable to locate the claimant, the ALJ may determine the claimant has
7 constructively waived the right to appear. HALLEX I-2-4-25(D)(2)(a) (Appointed Representative
8 Appears at Hearing Without the Claimant).⁷ The ALJ did not find Plaintiff had constructively
9 waived her right to appear during the hearing; on the contrary, she noted on the record that she
10 would "issue a notice to show cause and see where we go from there. I will consider, depending
11 on what comes in, I will consider whether if she was a necessary witness." AR 35-36. The ALJ
12 issued the notice requesting Plaintiff show cause for her failure to appear; if the ALJ decided
13 Plaintiff had a good reason for missing the hearing, another hearing would be scheduled. AR 175.

14 Plaintiff's representative responded on her behalf, explaining she was unable to locate
15 Plaintiff, but had learned from Plaintiff's father that Plaintiff was homeless, had no phone, and
16 was emotionally unstable. AR 177. Plaintiff's representative asked the ALJ to consider these
17 circumstances as good cause for the failure to appear and asked for a hearing to be scheduled so
18 that Plaintiff could testify. *Id.* "The term 'good cause' refers to a reasonable explanation for
19 failing to comply with a requirement. When determining whether good cause exists . . . an ALJ
20 must base his or her decision on the circumstances of each individual case. In doing so, the ALJ
21 must consider any physical, mental, educational, or linguistic limitations that may have prevented
22 the claimant from appearing at the scheduled time and place of the hearing." HALLEX I-2-4-
23 25(B). Circumstances that generally establish good cause include "unforeseeable events" that did
24 not provide the claimant or her representative enough time to notify the ALJ and request a

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⁷ HALLEX is the Commissioner's Hearings, Appeals, and Litigation Manual, an internal SSA
27 policy manual. *Lockwood v. Comm'r of Soc. Sec.*, 616 F.3d 1068, 1072 (9th Cir. 2010). It is not
28 binding upon this Court. *Id.*

1 postponement of the hearing. HALLEX I-2-4-25(C)(1)(b).

2 The ALJ did not schedule a subsequent hearing, and also did not address whether the
3 circumstances stated in the response to the notice constituted good cause. In her decision, the ALJ
4 stated only that Plaintiff's representative had been unable to locate Plaintiff. AR 16. The ALJ did
5 not evaluate the mental and physical limitations Plaintiff's representative identified in her
6 response, and did not specifically address why the proffered reasons for missing the hearing did
7 not constitute good cause. Citing HALLEX I-2-4-25(2)(a), the ALJ nevertheless found Plaintiff
8 had constructively waived her right to appear. AR 16.

9 If an ALJ finds the claimant has constructively waived the right to appear at the hearing,
10 "the ALJ will advise the appointed representative, either on the record during the hearing or in
11 writing thereafter, that he or she will not sent a Request to Show Cause for Failure to Appear to
12 the claimant." HALLEX I-2-4-25(D)(2)(a). If an ALJ finds the claimant has *not* constructively
13 waived the right to appear, the ALJ will advise the representative that a Request to Show Cause
14 will be sent to ask why she did not appear at the hearing. After the response period expires, if the
15 claimant fails to respond to the request to show cause or fails to show good cause for failing to
16 appear, the ALJ may determine the claimant has constructively waived her right to appear and
17 issue a decision based on the evidence of record. HALLEX I-2-4-25(D)(2)(b). Based on the
18 record, it appears the ALJ proceeded under section (D)(2)(b), which requires the ALJ to evaluate
19 whether Plaintiff had shown good cause for failing to appear, and not (D)(2)(a). The ALJ's failure
20 to do so was error.

21 Defendant nevertheless argues that any error was harmless because Plaintiff's presence at
22 the hearing was not necessary. Def.'s Mot. at 4-5. The Court does not agree. The ALJ rejected
23 the opinions of Plaintiff's treating and examining physicians. The ALJ also found Plaintiff not
24 entirely credible because she continued to use alcohol despite her treater's recommendation to
25 stop; she had a poor work history; and she appeared to be motivated to stop drinking by a denial of
26 benefits. Questioning Plaintiff during the hearing may have allowed the ALJ to understand
27 whether Plaintiff's inability to stop drinking and/or her poor work history were caused by her

1 bipolar disorder.⁸ Similarly, Plaintiff would have had the opportunity to explain that her
2 motivation to stop drinking was equally motivated by her desire to continue visitations with her
3 children. *See AR 762* (“She reports that because of wanting to be a good parent that she has
4 reduced her alcohol use”). And crucially, if the circumstances described in the letter were
5 accurate, the ALJ could have questioned Plaintiff about the conditions that led to her “losing it”
6 and hitting “rock bottom” (AR 177) – including whether she had experienced a manic episode,
7 and, if so, whether that episode took place when she was medication compliant and sober. The
8 Court cannot conclude that the ALJ’s failure to evaluate whether the circumstances presented
9 constituted good cause for Plaintiff’s absence from the hearing was harmless error.

10 **CONCLUSION**

11 For the reasons stated above, the Court **GRANTS** Plaintiff’s Motion for Summary
12 Judgment, **DENIES** Defendant’s Cross-Motion for Summary Judgment, **REVERSES** the ALJ’s
13 decision, and **REMANDS** the case for further proceedings. The ALJ shall evaluate whether
14 Plaintiff’s drug and alcohol use were material factors contributing to her disability based on a
15 proper weighing of the medical opinions of record and, if there was good cause for her failure to
16 appear and Plaintiff appears at a subsequent hearing, on Plaintiff’s testimony.

17 **IT IS SO ORDERED.**

18 Dated: October 17, 2017



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20 MARIA-ELENA JAMES
21 United States Magistrate Judge
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⁸ Because the Court is remanding the case for further proceedings, including potentially hearing Plaintiff’s testimony, it does not decide whether the ALJ erred in evaluating her credibility. *See* Pl.’s Mot. at 17-19. The Court does note the ALJ’s reasoning suggests she did not take into account the nature of Plaintiff’s bipolar disorder, including impulsivity and poor judgment. Moreover, the Ninth Circuit has remarked that “it is a questionable practice to chastise one with a mental impairment for the exercise of poor judgment in seeking rehabilitation.” *Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996) (citation omitted); *Willig v. Berryhill*, 2017 WL 2021369, at *7 (N.D. Cal. May 12, 2017) (ALJ erred by failing to evaluate whether noncompliance with treatment was result of borderline personality disorder or depression).